21 LIBRARY
SUPREME COURT. U. S.

No. 329

Office Supreme Court, U.S.
FILED
JAN 21 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CABOT CARBON COMPANY AND CABOT SHOPS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS CABOT CARBON COMPANY AND CABOT SHOPS, INC.

Of Counsel:

MILLING, SAAL, SAUNDERS, BENSON & WOODWARD
1122 Whitney Building
New Orleans, Louisiana

KULLMAN & LANG
801 Whitney Building
New Orleans, Louisiana

SHROYER, DENBO & DOOLAN
1625 K Street, N.W.
Washington 6, D. C.

M. TRUMAN WOODWARD, JR.
H. H. HILLYER, JR.
1122 Whitney Building
New Orleans, Louisiana

RICHARD C. KEENAN
801 Whitney Building
New Orleans, Louisiana

MILTON C. DENBO
1625 K Street, N.W.
Washington 6, D. C.

WILSON - EGES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	2
1. Proceedings herein	2
2. Background	3
3. The Employee Committees—Formation	4
4. The Employee Committees—By-laws	6
5. The Employee Committees—Operation	7
6. The "Central Committee"	9
Summary of Argument	10
Argument	11
I. The Act was purposely amended to make clear that an employer does not commit an unfair labor practice by establishing and maintaining a committee of employees to discuss with him problems of mutual interest including grievances, so long as the committee does not engage in collective bargaining	12
A. The law	12
B. The facts	18
C. Summary	19
D. The Government's arguments ignore the circumstances under which the 1947 amendments were enacted	20
II. The denial of the right of an employee committee to discuss problems of mutual interest with the employer raises serious constitutional questions	23
Conclusion	25

CITATIONS

Cases: PAGE

Budd Mfg. Co. v. N.L.R.B., 142 F. (2d) 922 24
Indiana Metal Products v. N.L.R.B., 202 F (2d) 613 ..... 13, 14
Mastro Plastics v N.L.R.B., 350 U.S. 270 23
N.L.R.B. v. American Furnace Co., 158 F. (2d) 376 13
N.L.R.B. v. Corning Glass Works, 204 F. (2d) 422 24
N.L.R.B. v. General Shoe Corp., 192 F. (2d) 504, *cert. den.* 343 U.S. 904 14
N.L.R.B. v. James H. Mathews & Co., 156 F. (2d) 706 13
N.L.R.B. v. Kennametal, Inc., 182 F. (2d) 817 ..... 14, 24
N.L.R.B. v. Lion Oil, 352 U.S. 282 23
N.L.R.B. v. Saxe-Glassman Shoe Corp., 201 F. (2d) 238 14
N.L.R.B. v. Sharples Chemicals, 209 F. (2d) 645 14
N.L.R.B. v. Standard Coil Products Co., 224 F. (2d) 465, *cert. den.* 350 U.S. 902 14
N.L.R.B. v. Stow Mfg. Co., 217 F. (2d) 900, *cert. den.*, 348 U.S. 964 ..... 14, 24
N.L.R.B. v. Truck Drivers Local Union 353 U.S. 87 23
N.L.R.B. v. Virginia Electric & Power Co., 314 U.S. 469 24
Pennsylvania Greyhound Lines, 1 N.L.R.B. 1, *enf. den.* 91 F. (2d) 178, *rev'd* 303 U.S. 261 13
Thomas v. Collins, 323 U.S. 516 ..... 14, 25
U.S. v. Int. Union UAW-CIO, 352 U.S. 567 24
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 ..... 11, 22

Statutes:

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. 151 *et seq.*):
Section 2 (5) 2, 12

PAGE

Section 8 (a) (2) 2, 12, 17, 20, 22, 24
Section 8 (c) 24
Section 9 (a) 2, 15, 16, 17, 22

Miscellaneous:

de Schweinitz, Labor & Management in a Common Enterprise 20
Guide to Labor Management Relations in the United States (U.S. Dept. of Labor, 1958) 20
H. Conf. Rep. No. 510, 80th Cong. 1st Sess. 21
H.R. 3020, 80th Cong. 1st Sess. 14, 15, 17
House Rep. No. 245, 80th Cong. 1st Sess. 15
Labor Management News, War Production Board, August 16, 1943 5
1 Leg. Hist. of Labor Management Relations Act, 1947:
p. 56 14
p. 183 15
p. 226 15
p. 244 16
pp. 294-295 20
pp. 295-296 21
p. 324 15
p. 408 ..... 20, 21
p. 430 16
p. 534 21
p. 549 16
p. 601 21
p. 608 21
p. 610 21
p. 621 21
pp. 725-726 20-21
pp. 862-863 21
p. 870 21
pp. 878-881 21

PAGE

p. 882 21
p. 884 21
p. 897 21
pp. 908-909 21

McElroy & Mores, Joint Production Committees, Monthly Labor Review (August 1948) 20
Nelson, Arsenal of Democracy, pp. 318-328 (1946) 5
Senate Rep. 105, 80th Cong. 1st Sess. 16
Working Harmony in 18 Companies (Nat'l Planning Ass'n, Case Study No. 13, 1953) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 329

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CABOT CARBON COMPANY AND CABOT SHOPS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS CABOT CARBON COMPANY AND CABOT SHOPS, INC.

OPINIONS BELOW

The opinion below, setting aside an order of the National Labor Relations Board and denying enforcement thereof, is reported at 256 F. (2d) 281 (R. 95).[1] The opinion of the Board is reported at 117 N.L.R.B. 1663 (R. 40-77, 81-85).

---

[1] References to the transcript of record in the court below, which is Vol. I of the Record before this Court, are designated "R". References to the joint appendix filed in that court, here printed as Vols. II and III of the Record and separately paginated, are designated "RII" and "RIII".

JURISDICTION

The judgment of the court below was entered on June 9, 1958 (R. 109). The petition for a writ of certiorari was granted on October 20, 1958 (R. 110). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Act prohibits discussion by a committee of employees with their employer of problems of mutual interest, including grievances, where such committee was established by the employer at the instance of the Government and was continued by the employer as a forum for discussion of mutual problems with employees, and which neither existed for the purpose of engaging in, nor in fact engaged in, any aspect of collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, are Sections 2(5), 8(a) (2) and 9(a). These provisions are printed on pp. 2-3 of the Petitioner's brief herein.

STATEMENT OF THE CASE

1. Proceedings Herein

Cabot Carbon Company and Cabot Shops, Inc. (hereinafter referred to as "Cabot") were charged with having dominated or interfered with the administration of, and with having contributed financial or other support to, certain "Employee Committees", in alleged violation of Section 8(a) (2) of the National Labor Relations Act, as amended.[2] Cabot denied the charge and, after hearings,

[2] 29 U.S.C. § 151, et seq. As used herein "the Act" refers to the Act of July 5, 1935, 49 Stat. 449, as amended by the Act of June 23, 1947, 61 Stat. 136, which, as so amended, is known as "Labor Management Relations Act, 1947", and is contained in 29 U.S.C. §§ 151-188.

an Intermediate Report of a Trial Examiner issued, recommending the disestablishment of the committees (R. 40-77). Cabot filed exceptions to the Intermediate Report, but the Board upheld the Trial Examiner, adopting the Intermediate Report as the basis of its Order (R. 81-85). Cabot thereupon petitioned the Court below for review (R. 1-3) and the Board cross-petitioned for enforcement (R. 3-5). The Court set the order aside and denied enforcement (R. 109).

2. Background

Cabot Carbon Company and Cabot Shops, Inc., are separate corporations, but each is a subsidiary of the same parent, Godfrey L. Cabot, Inc., a Massachusetts corporation founded in 1887, with headquarters in Boston. This case concerns only the so-called "Southwestern Division" of these companies headquartered in Pampa, Texas. In this division, Cabot Carbon Company operates numerous carbon black plants, gasoline plants, and produces oil and gas; and Cabot Shops manufactures oil well equipment and other products at two plants (R. 44-45).

Cabot has an outstanding labor relations record. Its wages are high and its benefit program extensive. On its own initiative it has instituted many practices in the interest of employees. It is constantly "on the lookout for possible improvements" in its employment policies. When economic conditions permit the granting of additional benefits, Cabot invariably grants them. (Cf. RII 265-266; RIII 879-893, 910-912; and see, generally, the "Cabot Guide", Exhibit "R-Stinson-10", and the various union contracts, Exhibits "R-Stinson-1, 2, 3 and 4", in original record).

Cabot has had union contracts for many years at several of its plants (R. 69). At its unionized plants, both prior and subsequent to the institution of the "employee committees" here involved, Cabot has bargained

with and entered into contracts with labor unions covering units of its employees (R. 69; RIII 881, 886-891). Since the institution of the committee system, the unions and the committees at those plants have existed side by side, the unions handling the "bargaining" functions, the committees performing the duties assigned them under their by-laws (R. 54-55, 69; RIII 512-515, 789-801, 866-870, 872-876).[3] No union had ever objected to the existence of the committees prior to the charge filed herein (RIII 892-893). The Board has never heretofore found Cabot to have committed any unfair labor practice (RII 266).

Except as to the question of the committees, the Board gave Cabot a clean bill of health (R. 69-72, 73-74).

3. The Employee Committees—Formation

During World War II, the War Production Board encouraged war industries to institute "Employee-Management Committees" (R. 96). Carbon black being a critical industry, the War Production Board recommended to Cabot that employee committees be set up both at union and non-union plants (R. 47; RII 217-220, 256-257).

A representative of the War Production Board conferred a number of times with Reno Stinson, Cabot's Director of Industrial Relations, and provided him with literature, including proposed by-laws, concerning the purposes and functions of such committees (RII 215-216,

---

[3] The Trial Examiner's statement commencing "In the event of conflict . . ." (R. 54), upon which Petitioner appears to rely (*Pet. Brief*, pp. 12, 13), contains a gratuitous assumption not supported by the evidence. There is no substantial evidence that there had ever been any conflict prior to the commencement of this proceeding. It is revealing that the only record reference which Petitioner has found to cite in support of the Trial Examiner is RIII 514 (*Pet. Brief*, p. 13). This reference is to the testimony of the Board's witness, Pettit, who testified that so far as he knew there had "never been any controversy" about having both an employee committee and a labor union in the plant in question.

256-257, 262-263). Mr. Stinson then had the employees at Cabot's various plants elect representatives to meet at Pampa, Texas to draft a set of by-laws for submission to the employees (RII 206, 215-218; RIII 898-899). The employee representatives met in Pampa with Mr. Stinson, who acted as Secretary of the meeting, and in so doing felt that he was acting chiefly as a representative of the War Production Board (RII 219). With the War Production Board material as a guide, by-laws were drafted, presented to the employees at the various plants for approval or disapproval, and approved by vote (RII 215-219, 256-263; RIII 897-900). The form of the by-laws was also approved by the War Production Board (RII 259-263). All of the "Purposes" contained in the present by-laws were contained in the original, although some of the original purposes have been omitted as obsolete (RII 260-263; RIII 940-942).[4] The foregoing facts were also found by the Court below (R. 96-97).

---

[4] See *Labor Management News* p. 1 (August 16, 1943), published by War Production Board, quoting the following joint endorsement of Labor-Management Committees by Frederick C. Crawford, President—National Association of Manufacturers; Eric A. Johnson, President—U.S. Chamber of Commerce; William Green, President—American Federation of Labor; Philip Murray, President—Congress of Industrial Organizations; Donald M. Nelson, Chairman—War Production Board; and Charles E. Wilson, Executive Vice Chairman—War Production Board:

> "The Labor-Management Committee Program now being promoted by the War Production Drive Division of WPB, under the direction of Mr. T. K. Quinn and endorsed by us, is designed to increase war production. It is not a plan to promote company unions. It is not a device to increase the power or position of any union. It does not interfere with any bargaining machinery or undertake its functions. It is not designed to conform to any scheme that contemplates a measure of control of management by labor or labor by management. It is not a labor plan or a management plan. It is the War Production Drive Plan to increase production by increasing efficiency through greater management and labor cooperation."

See also *Nelson, Arsenal of Democracy* pp. 318-328 (1946).

4. The Employee Committees—By-Laws

As stated by the Court below (R. 97), the by-laws expressly state the "purposes" of the committees, as follows:

> "Purposes
>
> "1. To bring about a better understanding between employees in every branch and service of our Company to the end that each will have a better insight to the other's problems.
>
> "2. To provide a definite procedure for considering employees' ideas. As an example the following problems are of mutual interest to employees and management:
>
> a. Safety.
>
> b. Increased efficiency in production.
>
> c. Conservation of supplies, materials, and equipment.
>
> d. Encouragement of ingenuity and initiative.
>
> e. Grievances (*nonunion plants* or departments)."

As also pointed out by the Court below (R. 97-98), the by-laws set forth the rights and duties of the committees, as follows:

> "It is understood that the Employee Committees do not in any way detract from the authority and responsibility of the supervisory force but should serve to assist plant management in general in solving problems of mutual interest. It shall be the Committee's responsibility to:
>
> "1. Meet with plant management at regular monthly meetings called by management and to attend any special meetings called by management.
>
> "2. Work with management on those problems of mutual interest as set out under "Purposes".
>
> "3. Make recommendations on the Suggestions from the employees in accordance with the Suggestion Plan.

"4. Call meetings of the employees if in their judgment this is necessary, and the Committee may invite management to attend if they think advisable, but all such meetings will be optional as far as management is concerned and will be on the employees' time.

"5. Handle grievances at nonunion plants and departments according to grievance procedure set up for these plants and departments. It shall be the duty of the Committee to call to the attention of management any troublemakers or acts of disturbance which would tend to lower morale, and it shall be the duty of the Committee to insist that gripes, grumbling, trouble-making among the employees either stop or be taken up under the regular grievance procedure at the plant."

These by-laws, along with many other matters, were included in a compilation of Cabot policy known as "The Guide" (R. 97).[5] There is no intimation in the by-laws or in any of the other material contained in the Guide that the committees are to "exist" for bargaining purposes or are to conflict in any way with any labor union.

5. The Employee Committees—Operation

The Court below correctly found (R. 98):

"The by-laws do not provide for any formal organization. There are no membership requirements, no dues, no officers, no funds. Employees at each plant elect a committee annually. The outgoing committee conducts the election. Monthly meetings are held with representatives of plant management. These meetings are called on company time and premises. The management assists in holding elections, calling meetings, preparing and posting minutes of the meetings, and defraying all expenses necessary to the operation of the committees."

---

[5] Portions of the Guide are quoted at RII 152-167. The complete Guide was introduced in evidence as "R-Stinson-10" (RIII 929-930).

The meetings were general discussion sessions at which anyone could talk about anything he desired (Cf. R. 98; RIII 515, 616, 667-668). The principal business conducted appears to have been the handling of the "Suggestion Plan", assisting in safety inspections, and, at nonunion plants, the processing of grievances (Cf. RII 152; RIII 566-567). At union plants grievances have always been handled by the union committees alone (RIII 783-784, 868, 873).

Cabot has never recognized any of the committees as having the right to represent its employees for purposes of collective bargaining (RII 263; cf. R. 98-99). It has never negotiated with any committee any agreement concerning wages, hours or working conditions (R. 61, 98; RII 263). No management representative in the Southwestern division other than Reno Stinson has authority to negotiate any such agreement; the management representatives at the committee meetings have no such authority (R. 98; RIII 878, 881-886; cf. RIII 705, 711-713, 860-863).

The committee members themselves recognize and acknowledge that they have no authority to negotiate agreements with management, and that their permitted functions do not include collective bargaining (R. 98; RIII 503-504, 588-590, 615-617, 652-655, 784, 842; cf. R. 61). However, there is no attempt by management to "gag" the committees and if questions are asked concerning bargainable subjects, management may give explanations or not, as the case may warrant (*e.g.* RIII 615-617, 794-795; cf. RIII 908-909).

In brief, as the Court below held, in the very language of the Trial Examiner adopted by the Board (R. 108):

> "The Committees have never attempted to negotiate a contract * * * [A]ll aspects of collective bargaining are either frustrated or absent. * * * [The committees] avoid the usual concept of collective bargaining, but provide a forum for discussion of

mutual problems, exchange of information, presentation and consideration of employee suggestions and recommendations, including the adjustment of grievances [at nonunion plants] and the improvement of working conditions".

6. The "Central Committee"

Reno Stinson is the management official directly responsible for over-all employment policies (R. 46). It is his duty to be constantly searching for methods of improving such policies (RIII 878-879). To fulfill his functions he needs information from the employees so that he can forestall problems and accumulate ideas for improvements. He uses several devices. Thus, he travels to the various plants and talks to individual employees, to the foremen and to plant management (*Id.*). He conducts Job Relations Training courses at the various plants, and at the end of the final meeting throws it open to a general discussion session at which any employee can bring up anything he desires (RIII 919-922). He gets copies of the minutes of all employee committee meetings so that he can check up on grievances (RII 237). Finally, he has direct communication with employee committeemen from the various plants at what has come to be called the "Central Committee" (RIII 907-909).

There is no provision in the by-laws for such a central committee (RIII 908; cf. RII 152-157). It is not an "organization" in any usual connotation of the word. It is an annual management meeting to which employee committeemen are invited as the guests of their plant managers (RII 242-244; RIII 907-909).

In the morning of such meeting the local plant management and their committeemen guests listen to speeches from top management in which Cabot's progress in the past year and prospects for the future are described (RIII 907-909). Outside speakers also lecture on topics of interest (*Id.*). Sometimes announcements as to proposed

wage or benefit increases are made (RIII 601, 768, 769). There is no audience participation (RIII 561). After lunch, the local plant management goes into a separate meeting with top management, and the employee committeemen meet with Reno Stinson (RIII 907-909). Every one is free to speak; the subjects of discussion are unlimited (*Id.*). If experts on various matters (insurance, for example) are needed to explain matters, Mr. Stinson calls them in (*Id.*). If any question as to company policy is raised, Mr. Stinson endeavors to explain it (*Id.*).

There is no negotiation or bargaining at this meeting (RIII 909; and see RIII 516-517, 623-626, 663-665, 769-771, 845-847; cf. R. 61).

The Court below also found the foregoing facts about the central committee (R. 98).

SUMMARY OF ARGUMENT

Under the original Act, the Board, in its anxiety to wipe out "company unions", went far and outlawed discussions which any committee of employees, formed or maintained by the employer, might have with the employer on matters pertaining to the employment relationship, even though there was no collective bargaining by the committee with the employer.

Congress was displeased with this interpretation of the statute and corrected it by the 1947 amendments.

Such amendments are clear that it was Congress' intention to permit an employer to establish and maintain an employee committee, with which problems of mutual interest might be discussed but which was not to engage in any collective bargaining. The House bill, at the time of the 1947 amendments, contained specific permission to this end. While such language was not contained in the bill as finally enacted in 1947, the conferees manifested their understanding that its objectives were implicit in other provisions of the bill. The argument of the Government, that the language was omitted because the Act

otherwise adequately safeguarded *employee* rights and action, is untenable. As the entire history and background of the 1947 amendments show, Congress was interested in equalizing the statute as between employer and employee and legalizing *employer* action that had theretofore been deemed unlawful. This was Congress' "mood" at that time (*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487) and the forces that produced the 1947 amendments were demonstrably interested in accomplishing precisely that end.

The employee committees here involved are in no sense company unions with the evils attendant thereupon. Unions coexist with the committees in several of respondents' plants. Such unions bargain collectively with the respondents; the employee committees do not. Even grievances are handled by unions alone except in those plants where the respondents have no unions. These committees are precisely the type of labor-management committees, which were endorsed during World War II by the War Production Board, the AFL, the CIO, the Chamber of Commerce, and the NAM. Many such committees, like those here, were continued post-war.

Finally, the Government's position, which would destroy all employee committees formed or maintained by the employer to discuss problems of mutual interest, is fraught with constitutional infirmities. These can and should be avoided by giving the statute the interpretation which the clear Congressional intent requires.

ARGUMENT

An employer, in the exercise of his managerial prerogatives, surely has the right to establish committees of his employees for any lawful purpose. Similarly, an employer has the right to talk to individual employees, groups of employees, or committees of employees about any lawful subject. But the Government in effect con-

tends that the employer does not have these basic rights, because, so it argues, if he establishes and maintains a committee of employees and talks to it about employee suggestions, employee complaints, or any working conditions, he transforms the otherwise lawful committee into an unlawful equivalent of a company union.

The Government would thereby render unlawful every cooperative program established by an employer for the benefit of his employees and in which employees participate, whether it be a safety program, an insurance program, or any of the many miscellaneous programs that benefit employees. In one way or another every such program involves discussion of working conditions, suggestions and complaints; if it did not, it would serve no useful purpose.

The practical effect of the Government's position is to preclude an employer from ever setting up a committee and working cooperatively with it for the mutual benefit of employer and employees. As we shall show, this is not the law.

I. THE ACT WAS PURPOSELY AMENDED TO MAKE CLEAR THAT AN EMPLOYER DOES NOT COMMIT AN UNFAIR LABOR PRACTICE BY ESTABLISHING AND MAINTAINING A COMMITTEE OF EMPLOYEES TO DISCUSS WITH HIM PROBLEMS OF MUTUAL INTEREST INCLUDING GRIEVANCES, SO LONG AS THE COMMITTEE DOES NOT ENGAGE IN COLLECTIVE BARGAINING.

A. THE LAW

Section 8(a) (2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ." Section 2(5) defines "labor organization" as meaning "any

organization of any kind, or any agency or employee representation committee or plan, in which employees participate *and which exists for the purpose*, in whole or in part, *of dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work". (Emphasis supplied).

These two sub-sections derive from the original National Labor Relations Act. Their obvious purpose was to destroy the "company union" or any like organization no matter what the name under which it masqueraded. The first question presented, therefore, is whether the employee committees here involved "exist for the purpose . . . of dealing with" Cabot "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work".

The very first case in the Board's reported decisions, *Pennsylvania Greyhound Lines*,[6] concerned an employee representation plan, which the Board easily found unlawful, since respondent admitted in its brief that the plan there involved was a labor organization. Ever since, the Board has been singularly successful in attacking plan after plan. The Courts have, in most cases, upheld the Board.[7] In some instances, the interpretation of the phrase "dealing with" has been an issue, and the decisions have assumed, as did the Trial Examiner in the instant case, that because a "discussion" of a subject bearing upon the employment relationship took place between an employer and employee representatives, such discussion amounted to "dealing with" the employer.[8] Even after

---

[6] 1 N.L.R.B. 1., *enf. den., N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 91 F. (2d) 178 (C.A. 3), *rev'd*, 303 U.S. 261.

[7] See, *e.g.*, *N.L.R.B.* v. *American Furnace Co.*, 158 F. (2d) 376 (C.A. 7); *N.L.R.B.* v. *Jas. H. Mathews & Co*, 156 F. (2d) 706 (C.A. 3).

[8] See, *e.g.*, *Indiana Metal Products* v. *N.L.R.B.* 202 F. (2d) 613 (C.A. 7); *N.L.R.B.* v. *Jas. H. Mathews & Co.*, 156 F. (2d) 706 (C.A. 3).

the amendments of 1947, hereinafter discussed, the Courts continued this error of equation.[9] The practical effect of the Board's orders, as upheld by the Courts, was to outlaw every employee representation plan, as it is too much to expect of any employee representative that he walk a verbal tightrope, never raising any question as to matters of consuming interest to him.[10] Similarly the management representative cannot be expected to refuse to listen to his employees' problems.

As the following review of the legislative history of the 1947 amendments demonstrates, Congress was not satisfied with the interpretation given the Act in this regard. It felt that there is a difference between a discussion between parties with no authority to deal or bargain and a discussion or dealing between parties who are in a position to bargain. The original "Hartley Bill" provided in Section 8(d):[11]

> "(d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:
>
> * * * *
>
> (2) Permitting employees to confer with the employer during working hours without loss of time or pay.

---

[9] Cf. *N.L.R.B.* v. *Standard Coil Products Co.*, 224 F. (2d) 465 (C.A. 1), *cert. den.* 350 U.S. 902; *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F. (2d) 900 (C.A. 2), *cert. den.* 348 U.S. 964; *N.L.R.B.* v. *Sharples Chemicals*, 209 F. (2d) 645 (C.A. 6); *Indiana Metal Products* v. *N.L.R.B.*, 202 F. (2d) 613 (C.A. 7); *N.L.R.B.* v. *Saxe-Glassman Shoe Corp.*, 201 F. (2d) 238 (C.A. 1); *N.L.R.B.* v. *General Shoe Corp.*, 192 F. (2d) 504 (C.A. 6), *cert. den.* 343 U.S. 904; *N.L.R.B.* v. *Kennametal, Inc.*, 182 F. (2d) 817 (C.A. 3).

[10] Cf. *Thomas* v. *Collins*, 323 U.S. 516, 534-535.

[11] *H.R. 3020*, 80th Cong., 1st Sess., p. 26. See "Legislative History of the Labor Management Relations Act, 1947" (U.S. Government Printing Office, 1948), Vol. I, p. 56. This publication is hereinafter cited as :"Leg. Hist."

"(3) Forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under Section 9. * * *"

House Report No. 245, p. 33, explained the reason for the proposed amendment (1 Leg. Hist. 324):

"Section 8(d) (3)—During World War II, many employers, with the help of the Government, set up labor-management committees with which they discussed matters of mutual interest. This exception to Section 8(a)(2) permits employers whose employees have not designated a bargaining representative to set up similar committees and to discuss with them wages, hours, working conditions and other subjects of collective bargaining as well as other matters of mutual interest; *but an employer may discuss subjects of collective bargaining only if the employees do not have a certified representative or one that the employer currently recognizes as the exclusive representative of the employees.* This clause does not permit 'company unions'. The employer and the committee may discuss and reach decisions, but neither side may require the other to make an agreement, or to follow the procedure of collective bargaining set forth in Section 2(11). The employees generally may elect members of the committee, but Section 8(a)(1) and (2) forbid the employer to create a formal organization having members among employees generally or other common characteristics of a labor union".

The House passed H.R. 3020, containing the foregoing Section 8(d)(3) (1 Leg. Hist. 183). The bill then went to the Senate and a substitute bill was there adopted, which did not contain the above quoted sub-section 8(d)(3) (1 Leg. Hist. 226), but achieved the same result through an amendment to Section 9(a). Thus, Section 9(a) of the original Act had provided that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a

unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer". The bill, as passed by the Senate, added following the word "employer", the language ultimately enacted into law: *"and to have such grievances adjusted,* without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. . ." (1 Leg. Hist. 244) (Emphasis supplied) See Senate Report S. 105, p. 24, 1 Leg. Hist. 430. As pointed out by the Court below, the Senate sponsors thought that Section 9(a) was sufficient in itself to allow groups of employees to present grievances to their employer (R. 105).

The Senate provision was adopted by the Conference Committee. The conferees explained the omission of Section 8(d)(3), as follows (1 Leg. Hist. 549):

> "(6) Section 8(d)(2) of the amended Labor Act in the House bill contains a provision which is found in Section 8(2) of the existing law and in section 8(a)(2) of the Senate Amendment and the conference agreement. This provides that an employer is not to be prohibited from permitting employees to confer with him during working hours without loss of time or pay. *This contemplates payments not only to individual employees but also to employees acting in a representative capacity in conferring with the employer.*
>
> "Section 8(d)(3) of the amended Labor Act in the House bill provided that nothing in the Act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest, if the employees did not have a bargaining representative. *This provision is omitted from the conference agreement since the act by its terms permits individual*

employees and groups of employees to meet with the employer and Section 9(a) of the conference agreement permits employers to answer their grievances." (Emphasis supplied).

The foregoing review of the legislative history makes plain that the objective of Section 8(d)(3) of H.R. 3020 was to correct the construction previously placed upon the Act by the Board and courts, and to permit the employer to create an employee committee, with which any subject bearing upon the employment relationship could be "discussed", but which was not to engage in collective bargaining. Although Section 8(d)(3) as such was not included in the bill as finally enacted, the conferees indicated that the objective of Section 8(d)(3) was implicit in the amendment to Section 9(a), when considered in the light of Section 8(a)(2).

The legislative intent is therefore apparent; nothing in the Act, as amended, forbids an employer from creating and maintaining a committee of employees, acting in a representative capacity, which exists for the purpose, in whole or in part, of "discussing" with the employer grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work, and of obtaining from the employer an adjustment of grievances, so long as the committee is not invested with the powers of collective bargaining.

The cases decided prior to the 1947 amendments can be of little value except to show, as part of the legislative history, the jurisprudence which the amendments were designed to correct. The cases decided after 1947 appear to have no direct application to the question of statutory interpretation here squarely presented. It is the clear legislative purpose to permit employee committees to exist, to handle grievances, and to discuss matters of mutual interest with the employer. It is equally clear that it is not the intention to permit an employer to create a "company union". The facts here disclose that these

committees were neither intended nor used as disguised "unions".

B. THE FACTS

Under the heading "B. The Employee Committees", the Trial Examiner detailed the history of the employee committees (R. 47-48), accepting the witness Stinson's version of their creation, but neglecting to mention the uncontradicted testimony that the committee by-laws were drafted from United States Government-supplied documents (RII 215-216, 256-257, 262-263), and were later reviewed and approved by a representative of the War Production Board (RII 259-260). In any event, the Examiner found that the By-laws of the Committees, as contained in "The Guide", provided for the "purposes" and the "rights and duties" which are quoted *supra*, pp. 6-7.

The Examiner found that the by-laws do not provide for any formal organization of employees as a "consolidated group"; that there are no membership requirements, no dues, and no officers other than Committee members and alternates; and that employee organization was limited to the election of committee members (R. 51). While not shown by the by-laws, the Examiner found (as the uncontradicted evidence required) that Cabot had, at several plants, recognized, bargained with, and entered into collective bargaining agreements with outside unions, and that the unions and committees co-existed in the same plant (R. 54-55). The uncontradicted evidence is that no union ever objected to the committees prior to this case (RIII 892-893).

The Examiner also found the following (R. 61):

> "The Committees have never attempted to negotiate a contract with Respondents, and all benefits, privileges, or concessions to employees resulting from such conferences depend entirely upon company policy or magnanimity. Thereby all aspects of collective bargaining are either frustrated or entirely absent.

Although the Examiner did not so state, the uncontroverted testimony is that the committee members understood that they had no authority to bargain, negotiate or "deal with" Cabot (RIII 503-504, 588-590, 615-617, 652-655, 784, 842), and that the management representatives who sat with the committees themselves had no authority to bargain, negotiate or "deal with" the committees (RIII 878, 881-886; *cf.* RIII 705, 711-713, 860-863), although they did have authority to adjust ordinary grievances.

The Trial Examiner cited a number of instances in which subjects "pertaining to labor relations and working conditions" were, as he put it "discussed or otherwise dealt with" (R. 53-55). Yet when he concluded his findings, the worst that he could say was that Cabot's "dealings" with the Committees "avoid the usual concept of collective bargaining, but provide a forum for discussion of mutual problems, exchange of information, presentation and consideration of employee suggestions and recommendations, including the adjustment of grievances and the improvement of working conditions" (R. 55). The net effect of the Intermediate Report on this subject is that the Committees functioned in accordance with the by-laws; that "discussions" of "grievances" and "suggestions" occurred, but no bargaining or negotiation.

The Examiner's summary, when taken in conjunction with his findings of no bargaining, bring this case squarely within the benediction of the 1947 amendments. The Examiner, proceeding under his appreciation of the law, made no distinction between "discussion" of a subject which might be bargainable, and "bargaining" on the same subject; to him, any "discussion" was "bargaining". As the Court below properly held, adopting the Trial Examiner's own findings, *supra* pp. 8-9, the law is to the contrary.

C. SUMMARY

There was no bargaining, negotiating or dealing with the committees; the employees as well as management

clearly understood the limits of their authorities. The committees were not intended to function as "company unions", did not function as unions, and made no pretence of being unions. They were not designed to deter, nor did they in fact deter unionization. True unions existed side by side with the committees in the same plants without friction for years—mute but indisputable evidence that the committees served no purpose at which even the original Section 8 (a) (2) of the Act was aimed. Since the law does not forbid "discussion" of bargainable subjects by employee committees, it is submitted that the decision of the Court below is clearly correct.[12]

D. THE GOVERNMENT'S ARGUMENTS IGNORE THE CIRCUMSTANCES UNDER WHICH THE 1947 AMENDMENTS WERE ENACTED

The Government contends that the Conference Report really rejected rather than adopted the import and intent of Section 8(d)(3). Its argument is that Section 8(d)(3) was rejected because the Act otherwise adequately safeguarded *employee* rights. *Pet. Br.*, pp. 35-36. In this connection the Government concedes that employee committees such as those here would be perfectly lawful if not set up and maintained by the employer. *Pet. Br.*, p. 40, Such arguments ignore not only the plain meaning of the Conference Report but the entire background of the 1947 amendments.

After World War II the public had been subjected to great inconvenience, if not danger, as a result of a series of crippling strikes (*e.g.*, 1 Leg. Hist. 294-295, 408, 725-

---

[12] Other labor-management committees initiated by the WPB were also continued postwar. See McElroy and Moros, *Joint Production Committees*, Monthly Labor Review (August, 1948); *de Schweinitz, Labor and Management in a Common Enterprise*, pp. 2-8, 144-176 (1948); *Guide to Labor-Management Relations in the United States* §2:07 (U.S. Dep't of Labor Bull. #1225, 1958). See also *Working Harmony in 18 Companies* pp. 25-41 (Nat'l Planning Ass'n, Case Study No. 13, 1953).

726). Discoveries of criminal and Communist infiltration and control of labor unions had been given wide publicity (*e.g.*, 1 Leg. Hist. 295-296). The Eightieth Congress, rightly or wrongly, considered that it had a mandate from the people to change the Wagner Act, so as to make the balance of bargaining power between employers and organized labor more equal (*cf.* 1 Leg. Hist. 601, 608, 897; 1 Leg. Hist. 295-296, 408, 621, 884). In the previous year (1946), Congress had passed the Case bill, but it had been vetoed (1 Leg. Hist. 610). The proponents of the amendments in 1947 had a sufficient majority to override a veto.

The sentiments of the House and the Senate, however, differed. The House was in favor of a "tough" bill; the Senate bill was not as far reaching. The temper of the House was such that its "tough" bill received a vote of 308 yeas, 107 nays and 17 not voting (1 Leg. Hist. 862-863). When the Senate amended the House bill by substituting its own, the House demanded a conference (1 Leg. Hist. 870). After some two weeks work the seven conferees reported a bill, which was neither the House bill nor the Senate bill but a new measure with some provisions drawn from each and some entirely new. (1 Leg. Hist. 878-881). The conference bill bore the House number and the conference report was by the managers on the part of the House. Such managers submitted their report (No. 510) "in explanation of the effect of the action agreed upon by the conferees" (1 Leg. Hist. 534) and this report was transmitted to both Houses. It is, therefore, the primary source of knowledge as to the legislative intent.

When the conference report was debated in the House, its sponsors were quick to point out that they had made only three basic concessions to the Senate; that as to other matters their objectives had been attained, even though Senate language had prevailed (1 Leg. Hist. 882; *cf.* 1 Leg. Hist. 908-909). The conference report is obvi-

ously aimed at explaining to the more militant body—the House—that, though its conferees may have yielded to the more subtle drafting technique of the Senate, the effect of the House provisions remained. There are no less than nineteen such explanations in the report, and no less than eight commence the explanation with the word "since".

Section 8(d)(3) of the House bill was a step in the direction of giving the employer more freedom of speech and action than the Board had accorded him; it permitted *employer* action in forming and maintaining committees of employees; it was not addressed to *employee* action. It verges on the preposterous to suppose that the House conferees would seek to justify their position to the Congress, in that context, by stating that they had agreed to the omission of a provision permitting *employer* action, "since" other provisions of the Act ((9) (a) and 8 (a) (2)) gave employees, *but not the employer*, the right to take such action. Yet that is precisely the Government's contention.

We submit that this contention does violence to the principles laid down by this Court as to how to read the legislative history of the 1947 amendments to the Act. Thus, in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487, 489-490 the Court said:

> "It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary . . ."
>
> • • • •
>
> "But the fair interpretation of a statute is often "the art of proliferating a purpose", Brooklyn Na-

tional Corp. v. Commissioner, 2 Cir., 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices.

> "To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions."

In *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 93 *et seq.* the Court again considered the legislative history of the Act as a whole in deciding a question of statutory interpretation thereunder. And in *Mastro Plastics* v. *NLRB*, 350 U.S. 270, 285 and *NLRB* v. *Lion Oil*, 352 U.S. 282, 288, the Court repeated the familiar principle that:

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy".

In sum, both the language of the statute as a whole and its object and policy, as made abundantly manifest while the 1947 amendments were working their way through to passage, establish that the Government's arguments must be rejected.

II. THE DENIAL OF THE RIGHT OF AN EMPLOYEE COMMITTEE TO DISCUSS PROBLEMS OF MUTUAL INTEREST WITH THE EMPLOYER RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

The Act expressly permits "discussions" with employees of any subject, provided such discussions contain no threat of reprisal or force or promise of benefit. Sec.

8(c). The Act also expressly permits meetings between employers and employees or employee representatives during working hours without loss of time or pay. See proviso to Section 8(a)(2). Yet if the Act is now construed as converting a discussion session into a bargaining session, then it forbids an employer to call a meeting with a group of his employees and discuss with them any matters pertaining to their jobs. And if it does this, it infringes basic constitutional guarantees. See *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477; *NLRB* v. *Corning Glass Works*, 204 F.(2d) 422 (C.A. 1); *Budd Mfg. Co.* v. *NLRB*, 142 F.(2d) 922, 926 (C.A. 3). If a statutory construction is available which avoids constitutional problems, this Court will of course adopt that construction. See *United States* v. *International Union UAW-CIO*, 352 U.S. 567, 590-591.

The practical effect of the Order of the Board is to deny entirely to Cabot and its employees the right to discuss any matters pertaining to their mutual affairs, except at the risk of having the Board find an informal group to be a labor organization,[13] and, if meeting at the employer's request, on employer time, on employer property, to be illegally dominated.[14] Therefore, in seeking enforcement of its Order here, the Board is seeking, in violation of the First Amendment to the Constitution of the United States, to have the injunctive process of this Court deny to Cabot and its employees their rights of free speech and peaceable assembly. The prohibition against discussing matters dealing with employees' jobs

---

[13] See, e.g., *N.L.R.B.* v. *Kennametal, Inc.*, 182 F.(2d) 817 (C.A. 3), where a completely unorganized group presenting spontaneous grievances was held to be a "labor organization".

[14] See, e.g., *N.L.R.B.* v. *Stow Mfg. Co.*, 217 F.(2d) 900 (C.A. 2) *cert. den.* 348 U.S. 964, where monthly meetings of employees at which the company president addressed employees and discussed grievances and conditions of work, such meetings being held on company time and property, were treated as "labor organizations" and as company dominated.

is an effective prohibition against all speech [15] with employees in groups, except where bargaining agents are involved. But, as already shown, the Taft-Hartley amendments make it clear that no such untenable restriction was envisaged, and that the right of an employer to "discuss" any subject with groups or committees of his employees, even grievances, is not restricted.

CONCLUSION

The committees here serve wholesome, beneficial purposes. By providing a forum for discussion and for interchange of information, they aid not only in technical production matters but in improving the relationship between Cabot and its employees. At the same time, since they steer clear of all phases of collective bargaining, these committees are not effective substitutes for unions and hence do not operate to interfere with the employees' choice of a bargaining representative.

The Board ordered the disestablishment of these committees on the basis of what is in essence a legal technicality, there being no proof whatever that they serve any unlawful purpose and the record on the contrary fully showing that they are highly beneficial to all parties. But if the Board's position is maintained, it will sound the death knell to all employee committees, formed or maintained by an employer, including even those which are set up for safety or health purposes, or to make suggestions to the employer, or to work against absenteeism. If the committees here are unlawful, every employee committee in which the employee representatives are not "gagged" is also unlawful. It would be beyond the limits of human self-control for the employees not to at least talk about or "discuss" the matters that interest them most vitally.

---

[15] Cf. *Thomas* v. *Collins*, 323 U.S. 516, 530, 535.

Even in the original Act, it was never intended that an employer's freedom of speech be restricted, much less the speech of his employees. However, the Board, in its zeal to suppress "company unions", went far beyond the legislative intent and held unlawful any employee committee formed or maintained by the employer, which merely "discussed" and did not "bargain" with respect to subjects bearing upon the employment relationship. The Congress, dissatisfied with the situation, undertook to correct it in the 1947 amendments.

As the Court below stated:

> "It is not necessary to spin gossamer distinctions in order to show that one of the purposes of the Taft-Hartley Act was to allow more freedom of action to individual employees and to nonunion employee groups than the Wagner Act allowed. Between the two enactments World War II intervened. The War Production Board, a federal agency, initiated and developed employee committees . . . " (R. 106).
>
> • • • • •
>
> "We rest our holding squarely on the meaning of the Act, as evidenced in its legislative history. The Act permits, and Congress intended that it should permit, the existence of employee-management committees which provide a forum for discussion of matters of mutual interest, but which are not formal organizations, do not follow collective bargaining procedures (formally or informally), have no powers to bargain collectively, and take no action inconsistent with the terms of an existing collective bargaining agreement" (R. 107).

The judgment below should be affirmed.

Respectfully submitted,

M. Truman Woodward, Jr.
H. H. Hillyer, Jr.
1122 Whitney Building
New Orleans, Louisiana

Richard C. Keenan
801 Whitney Building
New Orleans, Louisiana

Milton C. Denbo
1625 K Street, N.W.
Washington 6, D. C.

Of Counsel:

Milling, Saal, Saunders,
Benson & Woodward
1122 Whitney Building
New Orleans, Louisiana

Kullman & Lang
801 Whitney Building
New Orleans, Louisiana

Shroyer, Denbo & Doolan
1625 K Street, N.W.
Washington 6, D. C.

January, 1959